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373-461---70

In the Supreme Court of the United States

OCTOBER TERM, 1969

THE NEW HAVEN INCLUSION CASES

No. ———

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, PETITIONERS

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BEFORE JUDGMENT

The Solicitor General on behalf of the United States and the Interstate Commerce Commission petitions for a writ of certiorari before judgment in the United States Court of Appeals for the Second Circuit to review that part of the order entered in this case by the United States District Court for the District of Connecticut on July 28, 1969, which set aside the Commission's determination of the price to be paid by the Penn Central Company for the properties of the New York, New Haven and Hartford Railroad Company.

OPINIONS BELOW

The district court's opinion of May 28, 1969—which was the basis for that portion of its July 28, 1969 order that we seek to have reviewed by this Court—is reported at 304 F. Supp. 793, and is set forth at App.[1] 277a–306a. The district court is referred to hereafter as the "reorganization court."

The Commission's decisions defining the terms for the inclusion of the New Haven properties into Penn Central have been set forth in a series of supplemental reports in *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, I.C.C. Finance Docket No. 21989, etc. Those reports, together with pertinent other decisions of the reorganization court and the three-judge court in the Southern District of New York that has been concerned with this and other aspects of the Penn-Central merger, are cited and described in the discussion *infra* and in the separate Memorandum that we are filing, contemporaneously herewith, with respect to the various pending New Haven Inclusion Cases, No. 914 *et seq.*, this Term. The Commission's Fourth Supplemental Report of November 25, 1968, which was set aside in the decision of the reorganization court that we seek to have reviewed here, is reported at 334 I.C.C. 25 and is set

[1] "App." refers to the Appendix of Decisions and Constitutional and Statutory Provisions filed under the caption *The New Haven Railroad Terms of Sale and Inclusion Cases* in No. 914 *et seq.*, this Term, for incorporation by reference in the various petitions and jurisdictional statements filed with respect to the valuation of the New Haven.

forth at App. 112a–220a; this report is referred to in this litigation as the "Remand Report."

JURISDICTION

The order of the reorganization court was entered on July 28, 1969. On September 22, 1969, the government filed a timely notice of appeal from that order to the Court of Appeals for the Second Circuit, where the appeal was timely docketed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

QUESTION PRESENTED

Whether the reorganization court—in contrast to the three-judge court which has also reviewed the Commission's determination of price under a similar statutory standard—improperly substituted for the Commission's determination its own independent judgment of the liquidation value to be given the New Haven's properties, in the following particulars:

(a) by rejecting the Commission's finding that the liquidation value should reflect (in the amount of $15.4 million) the cost to New Haven of a one-year delay before an abandonment certificate could be obtained;

(b) by rejecting the Commission's finding that the valuation of New Haven's real estate should reflect (in the amount of $6.7 million) the risks that the New Haven would incur in selling its numerous properties piecemeal rather than in bulk;

(c) by substituting its own valuation of $22.5 million for New Haven's Harlem River and Oak Point

yards in the Bronx for the Commission's valuation of $18.1 million; and

(d) by substituting its own discount of liquidation proceeds to present worth for the Commission's, with a resulting increase of approximately $2 million in the price Penn Central would have to pay.

STATUTE INVOLVED

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U.S.C. 205) are set out at App. 458a–465a.

STATEMENT

The New Haven has been in reorganization under Section 77 of the Bankruptcy Act since 1961. In 1962, after the Penn-Central merger application was filed, the trustees petitioned for inclusion of the New Haven in the merged system. When this Court sustained the Penn-Central merger, it upheld the Commission's action in conditioning its approval of the merger on inclusion of the New Haven in the merged company. *Penn-Central Merger Cases,* 389 U.S 486, 507–511. By consummating their merger on February 1, 1968, the merging parties irrevocably accepted this condition.

Prior to consummation the Commission had, in its "Inclusion Report,"[2] defined terms for sale of the New Haven properties to Penn Central, both as a condition under the merger provisions of the Interstate Commerce Act (49 U.S.C. 5(2)(b)) and as the

[2] The Second Supplemental Report in Finance Docket No. 21989, etc. (App. 1a–111a), reported at 331 I.C.C. 643.

first step of a reorganization plan under the railroad reorganization provisions (Section 77(b)(5), 77(d)) of the Bankruptcy Act (11 U.S.C. 205(b)(5), 205 (d)). The Inclusion Report was certified to the reorganization court, in the proceeding pending there since 1961, for judicial approval and adoption under Section 77(e) as "fair and equitable." It was also reviewed by a three-judge district court in the Southern District of New York under 28 U.S.C. 1336(a) and 2321–2325; that court, which also had reviewed the earlier phases of the merger, was called upon to review the Commission's determination, under Sections 5(2)(b) and (d) of the Interstate Commerce Act, that the terms of inclusion were "just and reasonable" and "equitable."

Subsequent to this Court's decision in the *Penn-Central Merger Cases, supra,* which did not deal with the Inclusion Report, both the reorganization court and the three-judge court concurred in remanding the matter to the Commission for reconsideration and possible rehearing.[3]

The remanded proceeding was expedited, and the Commission issued a new report (the Remand Report) prescribing new terms for New Haven's inclusion, including a higher price for its properties. In addition, consistent with the reorganization court's order, it required Penn Central to include the New Haven

[3] *The New York, N.H. & H. R. Co. First Mortgage 4% Bondholders Committee* v. *United States*, 289 F. Supp. 418 (S.D.N.Y.), App. 323a; *In re New York, N.H. & H. R. Co.*, 289 F. Supp. 451 (D. Conn.), App. 237a.

operations in its system on or before January 1, 1969, subject to such revision of the price as might result from further judicial review, and imposed on Penn Central $5 million of New Haven's 1968 operating losses.

Various parties, including the New Haven bondholders and Penn Central, then began a second round of litigation in the reorganization court and in the three-judge court. The reorganization court—in the opinion and order we now seek to have reviewed—sustained the Remand Report in large part, but set it aside as to four key items affecting the price to be paid by Penn Central, with the effect of increasing that price substantially. Following its own review of the Remand Report, the three-judge court (Judge Weinfeld dissenting) sustained the Commission except in respects not here material.[4] The two courts accepted basically the same pricing criterion—the liquidation value of the New Haven properties—but differed in their approaches to the Commission's application of this criterion. The conflict between the two courts, which is reflected in more detail in our statement of the questions presented at pp. 3–4, *supra*; and in our Memorandum on the other pending cases, amounts to a difference of approximately $29 million in the price to be paid by Penn Central.

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[4] App. 400a–443a, not yet reported. The Commission issued a Fifth Supplemental Report (App. 222a, 334 I.C.C. 528) making the modifications indicated by the three-judge court.

Three bondholder groups have now docketed in this Court their direct appeals from the decision of the three-judge court, and have also filed petitions for writs of certiorari before judgment to review the decision of the reorganization court.[5] As we detail in our Memorandum with respect to those cases, the bondholders' petitions relate primarily to the issues upon which the two courts agree, as distinct from this petition and a petition filed by the Penn Central Company (No. 1038), which relate to those issues on which the reorganization court and the three-judge court disagree. All of the petitions arise out of appeals docketed by the various petitioners in the United States Court of Appeals for the Second Circuit; no further proceedings have yet been had in that court on any of the appeals, except that they have been consolidated.

REASONS FOR GRANTING THE WRIT

This petition brings before the Court a conflict arising from the unusual dual jurisdiction of the two courts that have been for many years concerned with the reorganization of the New Haven and its inclusion

[5] Nos. 915, 917 and 921 are the bondholders' appeals from the decree of the three-judge court. Nos. 914, 916 and 920 are their petitions for writs of certiorari to the Court of Appeals for the Second Circuit before judgment.

Providence and Worcester Company (the successor to the Providence and Worcester Railroad Company) has also filed a jurisdictional statement (No. 919) and a petition for a writ of certiorari before judgment (No. 918), in which it raises questions concerning its own incorporation into the merged system. It takes no position on the question whether certiorari should be granted before judgment.

into the merged Penn Central system. Although the conflict is relatively narrow in scope it is, we believe, of substantial importance largely because it is an obstacle to the prompt termination of long pending litigation that has twice before been in this Court on the merits and has continually been before the lower courts and the Commission for many years. Since the Court is in any event called upon to consider the conflict in disposing of the pending direct appeals from the three-judge court, we believe that it is desirable to bring the reorganization court's decision here for simultaneous review on the merits, so that all parties' arguments concerning the New Haven valuation can be considered in an orderly manner. And—as we state in our separate Memorandum acquiescing in the granting of certiorari and noting of probable jurisdiction in the related pending cases—we believe that there is a significant public interest, in addition to the interest of judicial economy, in finally disposing of this long pending litigation as promptly as possible. To that end, our Memorandum suggests procedures looking toward disposition of all these cases this Term.

Although we acquiesce in the granting of the petitions for writs of certiorari before judgment filed by the bondholders and Providence and Worcester, we believe that the matters that will most warrant this Court's attention on the merits are those as to which the two courts have disagreed, *i.e.*, those raised by this petition and that of Penn Central (No. 1038) and by the bondholders' jurisdictional statements (Nos. 915, 917 and 921) to the extent they attack the three-judge

court's disagreements with the reorganization court.[6] These disagreements boil down in substance to differing views of the deference that the courts should give to the Commission's determination of a reasonable liquidation value for the New Haven properties. The two courts agree that the "fair and equitable" price for purposes of the Bankruptcy Act and the "just and reasonable" and "equitable" price for purposes of the Interstate Commerce Act are in principle the same—that is, the liquidation value of the properties as of an appropriate date. We believe that the three-judge court gave proper deference to the Commission and that the reorganization court improperly substituted its own judgment based on what Judge Friendly called (App. 406a) "the familiarity about the facts of the case [that the courts] have somewhat painfully gained" over the years. That difference gives rise to a question that is appropriate for this Court's consideration.

The suitability of this Court's consideration of the New Haven valuation problems without awaiting a decision by the court of appeals is enhanced by the fact that the three-judge court's decision followed and amounted to its review of the decision of the reorganization court.[7] Although this factor is of no

[6] Since the bondholders mount a general attack on the three-judge court's decision, they also present questions as to which the two courts agree.

[7] The opinion on which the Reorganization Court's order is based was issued on May 28, 1969; the three-judge court's opinions followed on June 18, 1969, and discussed the Reorganization Court's opinion in some detail.

technical significance, it does assure that the questions now presented have been thoroughly considered below, with efforts made to reconcile the views of the two courts. Those efforts have largely succeeded, and this Court is now presented with issues of manageable proportions arising out of a single, relatively well defined underlying disagreement. Thus, we believe that the matter is ripe for final consideration by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari before judgment should be granted, looking toward expeditious consideration on the merits as suggested in our contemporaneous Memorandum in Nos. 914 *et seq.*

Respectfully submitted.

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